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No. 07-1300

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SUPREME COURT, U.S.

In The Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,

Petitioner,

v.

CYNTHIA DILLON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF ISSUES

Whether the Court should grant the Petition hereon to resolve the following questions:

1. Whether a reasonable jury was compelled to find that Dillon deliberately withheld from the Commission the fact that her mother was sixteen when she gave birth to her and whether the Commission was also "entitled" to that same information as a matter of law under the notice provision of the FMLA despite having been provided adequate notice that Dillon had an *in loco parentis* relationship to her grandmother and despite the Commission's never even having discussed the issue with Dillon?

2. Whether the trial court's admission of evidence beyond merely Dillon's pre-termination statements to the Commission to establish Dillon's qualification for FMLA leave was an abuse of discretion where the trial court gave an extremely restrictive limiting instruction as to the jury's use of the evidence?

3. Whether Dillon's grandmother's doctor's mistaken notation on the FMLA application form compelled the jury to find that Dillon deliberately lied about the reasons for her need for FMLA leave as a matter of law?

4. Whether the trial court erred in giving the "needed to care" jury instruction when there was evidence that Dillon provided to her employer prior to the termination several reasons that she was "needed to care" for her grandmother that were contained in the jury instruction?

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INTRODUCTION

It was not without good reason that the Fourth Circuit issued a brief *per curiam* opinion in this case and deemed the Commission's appeal from the jury verdict not worthy of oral argument before a three-judge panel, let alone rehearing *en banc*. Put simply, the Commission's arguments before the Fourth Circuit and now for granting certiorari in this case largely boil down to its disagreements with the jury's resolution of factual disputes.

In desperation the Commission misrepresents the Fourth Circuit's holding in this case in a weak attempt to argue there is a split in the circuits. The Commission alleges that the Fourth Circuit in this case held it liable for "interfering with an employee's FMLA rights [even though] the employee deliberately withh[eld] from the employer or deliberately misle[d] the employer about the reasons leave [wa]s needed in the first place." Pet. at 26-27. As evidence of the split, the Commission then cites an Eleventh Circuit case holding that the employee cannot qualify for FMLA leave if she provides false information to the employer at the time the decision is made. Gay v. Gilman Paper Company, 125 F.3d 1432 (11th Cir. 1997). Unfortunately for the Commission, its representation as to the Fourth Circuit's holding in this case bears no resemblance to reality since there was no evidence that Dillon "deliberately withheld" or "deliberately misled" the Commission in asserting her reasons for needing FMLA leave in this case nor was a reasonable jury was compelled to find that she had deliberately misled the Commission or deliberately withheld

information from them. Therefore, there is simply no split in the circuits on this "issue"; it is purely manufactured by the Commission.

The background facts here are straight forward. The Commission denied Dillon FMLA leave and terminated her because it incorrectly insisted that Dillon's grandmother had to have been "recognized legally as [Dillon's] parent" in order for Dillon to qualify for FMLA leave to care for her. Pet. at 139a. (Petitioner even requested documents from respondent to show that respondent's grandmother had legally adopted her.) The Commission later raised many additional objections to her qualification for FMLA leave during the litigation which it did not raise at the time it denied Dillon FMLA leave, and then it objected when Dillon attempted to introduce evidence to counter those new objections, claiming that Dillon had never shown it such rebuttal evidence before the termination. However, again, at the time of the termination the Commission's focus was on whether Dillon's grandmother was "legally recognized" as her parent and whether the grandmother adopted her.

The Commission now makes, essentially, four specific arguments supporting its misrepresentation of the Fourth Circuit's holding described above, all of which are without merit. First, the Commission argues that a reasonable jury was required to find as a matter of law that Dillon deliberately withheld the fact that her mother wa sixteen at the time she gave birth to her (which related to the issue of whether Dillon's grandmother was *in loco parentis* to Dillon during Dillon's childhood) and that it had an

"entitlement" to such information before terminating her. However the issue of Dillon's mother's age never came up in the pre-termination discussions between Dillon and the Commission. Thus, there is no evidence that Dillon deliberately withheld such information and, indeed, the Commission was told twice by Dillon that her grandmother "actually raised" her, providing it sufficient notice of the nature of Dillon's relationship with her grandmother. The Commission's argument would also make the statute's notice provision impossibly burdensome since it would require an employee to provide not just sufficient facts to invoke the FMLA but every possible fact that might relate to the decision to grant FMLA leave.

Second, the Commission argues that, contrary to the Fourth Circuit's holding, Dillon could only present as evidence of FMLA qualification in this case statements she made to the Commission prior to her termination, even though prior to the termination the Commission only objected because Dillon's grandmother was not "recognized legally" as her parent. However, the trial court and Fourth Circuit correctly held that Dillon could use more than her pre-termination statements to establish she was in fact qualified for leave under the FMLA as long as there was an instruction limiting the jury's use of such evidence to this issue.

Third, the Commission argues that a reasonable jury was compelled as a matter of law to find that her grandmother's doctor's mistaken notation on Dillon's FMLA leave request demonstrated that Dillon deliberately lied to the

Commission about her reasons for needing leave. Again, no such conclusion was compelled given the record evidence in the case.

Finally, the Commission argues that the "needed to care for" jury instruction given by the trial court allowed Dillon to argue that she was "needed to care for" her grandmother for reasons she never communicated to the Commission at the time of the decision denying her FMLA leave: *viz.*,to relieve the regular care giver and to find better overall healthcare arrangements for her grandmother who had just suffered a stroke and was living in a place without even indoor plumbing or running water. However, the Commission never objected prior to its decision to deny her FMLA leave that she was not needed to care for her grandmother. It only raised this objection later during the litigation–therefore, Dillon was entitled to refute this objection with whatever evidence she had. Additionally, there was record evidence that Dillon did communicate these reasons to the Commission prior to the decision denying her FMLA leave; indeed it was undisputed that she had asserted at least one of the reasons.

STATEMENT

I. Petitioner's Argument that this Court Should Grant Certiorari Because Respondent did not Disclose Her Mother was Sixteen When she Gave Birth to Her is Completely Without Merit.

Under the FMLA an employee may take leave to care for a "parent" with a "serious health condition". 29 U.S.C. § 2612(1)(c). The definition of a "parent" for purposes of the FMLA includes "a biological parent or any individual who stood *in loco parentis* to an employee when the employee was a son or a daughter." 29 U.S.C. § 2611(7); 29 C.F.R. § 825.113(b). A "son or a daughter" is a "legal ward or the child of a person standing *in loco parentis*, who is under age 18 or age 18." 29 U.S.C. § 2611(12); 29 C.F.R. § 825.113(c)(3). Persons who are *in loco parentis* to an employee include those individuals who had "day-to-day responsibilities" to care for and "financially support" the employee when she was a child. 29 C.F.R. § 825.113(c)(3). A "biological or a legal relationship is not necessary" between the employee and the person who stood in loco parentis for a person to be considered an employee's parent under the FMLA. *Id.* "The term '*in loco parentis*,' according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties." Niewiadomski v. United States, 159 F.2d 683, 686

(6th Cir. 1947). *Black's Law Dictionary* defines the phrase "in loco parentis" as "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." *Black's Law Dictionary* p. 787 (6th ed. 1990).

The notice provisions of the FMLA merely require that the employee indicate leave is needed, the reason for the leave, and provide information responding to whatever reasonable questions the employer has about the leave. See 29 C.F.R. § 825.302(c); Thorson v. Gemini, Inc., 205 F.3d 370, 381 (8th Cir. 2000) ("Under the FMLA, an employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave").

In the instant case in addition to telling the Commission of her need for leave to care for her grandmother who had just suffered a stroke, Dillon told the Commission on two occasions prior to its denying her FMLA leave that her grandmother had "actually raised" her as a child, clearly putting the Commission on notice of the *in loco parentis* type of relationship described above which qualified Dillon for FMLA leave. Nevertheless, the Commission argues that because Dillon did not also indicate at the time of the decision to deny her FMLA leave all possible salient facts–in this case that her birth mother was sixteen when she gave birth to her (which never came up in the discussions between Dillon and the Commission)–somehow that means that Dillon was deliberately withholding this information it was "entitled" to have as a matter of

law. However, the Commission points to no evidence that Dillon deliberately withheld that or any other information or that it even inquired about the age of Dillon's mother. Indeed the Commission's argument simply amounts to a disagreement with the jury's apparent conclusion on this factual issue. As to the argument that the Commission was "entitled" to this fact as a matter of law (an argument never previously raised by the Commission), one need only point to the trial court's holding that the Commission had sufficient notice at the time of the termination that during a period of Dillon's childhood Dillon's grandmother stood *in loco parentis* to Dillon, including as described above that her grandmother "actually raised" her. Sherrod v. Philadelphia Glass Works, 57 Fed. Appx. 68 (3d Cir. 2003) (employer had no obligation to grant leave once the plaintiff made clear to the employer that her grandmother "raised her"). The trial court cited to the following evidence in the record:

> Ms. Dillon's January 4, 2003 letter reveals that her grandmother, in essence, had day-to-day responsibilities. Ms. Dillon notes her mother was around, but she discloses she was always with her grandmother. Ms. Dillon describes her grandmother as being instrumental in her life and playing a major role in her upbringing. A reasonable jury could infer that Ms. Dillon was very dependent as a child upon her grandmother.

Pet. at 27a.

Thus, the Commission's argument would mean that the notice requirement of the statute would dictate that an employee must provide each and every possible relevant fact and argument supporting her qualification for leave at the time the request is made by the employee, even where the information the employee did provide was more than sufficient to put the employer on notice that FMLA was needed, where the specific factual issue was never raised, and where she has answered all questions raised by the employer. While the Commission claims the Fourth Circuit held it to an impossible standard, it is really the Commission which seeks to hold employees to an impossible standard not supported by the statute or the regulations. Here it is clear that Dillon responded truthfully and completely to all questions presented to her by petitioner, which were mainly directed to whether she had evidence that she was legally adopted.

II. The Trial Court and the Fourth Circuit Correctly Held that Dillon was not Limited to Simply her Statements to the Commission prior to her Termination to Show that She was in fact Qualified for FMLA Leave.

The Commission also argues that the jury should have only been allowed to consider pre-termination statements Dillon made to the Commission not just on the issue of notice but as to all aspect of her qualification for FMLA leave, and even though the Commission raised myriad new

objections to her qualification for FMLA at trial never raised at the time of the decision to deny her FMLA leave. In response to this argument below the trial court held correctly held:

> [P]ost-termination evidence is relevant to whether Ms. Dillon was qualified to take FMLA leave to care for her grandmother at the time the Commission fired Ms. Dillon.... Both parties acknowledge Ms. Dillon bears the burden of proving her grandmother had a serious health condition, that Ms. Dillon was needed to care for her grandmother within the meaning of the FMLA and that Ms. Dillon was entitled to coverage under the FMLA.

Pet. at 100a.

Indeed the court went on to give a limiting instruction that was far more restrictive of the jury's use of the evidence than the law required (and therefore far more favorable to the Commission):

> Information that was not provided to the defendant by the plaintiff and her grandmother's doctor prior to January 17, 2003, the date of the termination, may not be considered on the issue of whether the employer interfered with any FMLA rights the plaintiff may have had by earlier terminating her employment.

Trial Tr. at 136 (March 22, 2006).

The jury could have readily believed that as a result of this instruction that it was not allowed to consider post-termination evidence at all. Nevertheless, the Commission argues that the trial court abused its discretion by admitting any "post-termination" evidence for any purpose, even with the limiting instruction. The Commission is incorrect on both counts.

First, as indicated above, the evidence the Commission objects to was admitted to show Dillon was in fact qualified for FMLA and in many cases to refute objections not raised by the Commission until the litigation. Second, even if the trial court erred in allowing the jury to hear the evidence, it was more than cured by the court's extremely restrictive instruction to the jury. Finally, the Commission does not show that it was in any way harmed by the admission of the evidence other than this generalized assertion of prejudice.

III. This Court Should Not Grant Certiorari Based on a Mistaken Doctor's Notation on The FMLA Request Form.

The Commission also makes much ado about the doctor's notation on the FMLA certification indicating "Cynthia Dillon (granddaughter) came and looked after her and found B. Ellis to look after her." Pet. at 19. The Commission insinuates that Dillon lied to the doctor about finding Ms. Ellis since Ellis was Dillon's grandmother's daughter and primary care-taker all along. However, this argument is simply a quarrel with the jury's

apparent factual findings, which is not a basis for granting certiorari. Moreover, the Commission's preferred factual finding is not even supported by the record. Dillon never told the Commission that she was needed to care for her grandmother so that she could find a full-time caretaker. Her concern was (as she explained to the Commission at the time) finding better living arrangements for her grandmother after the stroke as well as providing physical care for her grandmother during the critical two to three week period after the stroke. Pet. at 19a, 84a. The trial court correctly held that the jury could have easily found that the doctor simply misunderstood the situation and believed that B. Ellis was the found caretaker since the doctor had never seen B. Ellis before. Indeed, it would have made no sense for Dillon to mislead the doctor by claiming she was seeking a caretaker since Dillon repeatedly told the Commission that she needed the time in order to "find a home" for her grandmother and because she was taking care of her grandmother. Pet. at 19a, 84a. But the bottom line here is that there is a factual dispute that was for the jury to decide. While the Commission wishes the jury found that Dillon deliberately withheld information from the Commission, the jury was not required to so find.

IV. This Court Should not Grant Certiorari Based on the Argument that the Trial Court Improperly Instructed the Jury on the "Needed to Care for" Element of Proof.

The Commission objects because the trial court gave the following "needed to care for"

instruction to the jury: "The phrase ['needed to care for'] also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such a transfer to a nursing home." Pet. at 83a. The Commission argues that the jury instruction allowed Dillon to argue she was "needed for care" for her grandmother in order to find better care arrangements for her grandmother after the stroke and in order to fill in for others even though she did not explicitly assert these reasons to the Commission prior to the termination. The Commission's argument is without merit for several reasons.

First, the Commission never objected at all at the time of the termination that she was not needed to care for her grandmother or that she did not need to make changes in care for her grandmother–it only argued that her grandmother was not legally recognized as her parent under the FMLA. So there was no reason Dillon should be limited to her post-termination statement as the Commission argues. Second, even if Dillon were limited to pre-termination statements, there was evidence in the record that Dillon did assert to the Commission prior to her termination that she was needed to care for her grandmother in order to change care and in order to relieve a care giver. As the trial court held, it "is undisputed that in her e-mails to Ms. Barney prior to January 17, 2003, Ms. Dillon sought an extension because her grandmother was ill and Ms. Dillon needed to find a better place for her grandmother to live." Pet. at 83a-84a. Dillon also indicated in an email that she needed to physically

care for her grandmother as well. ("I have been taking care of her ever since I got here." Pet. at 19a.) She had to physically care for her grandmother in order to relieve the normal care giver. She did not specifically indicate it was "in relief of a care giver" at the time of the FMLA leave denial but only because the Commission never explored the issue with her–again, the Commission was only focused on the relationship with her grandmother. In any event, as the trial court correctly held, whether or not Dillon indicated that she was needed to relieve a care giver explicitly enough, any error in instructing the jury here was harmless since there was no dispute that she asserted she needed to find a change in care and "defendant has presented no evidence showing the jury relied on the first clause [relief of a care giver], [versus] the second clause [change in care] in determining Ms. Dillon's FMLA entitlement." Pet at 84a.

REASONS FOR DENYING THE PETITION

As shown above there is simply no split in the circuits which this court needs to resolve. In reality the Commission still cannot accept the jury's resolution in this case of garden-variety factual disputes and the inferences to be drawn from the record. But that is simply no basis for this Court to grant certiorari.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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